

Chau Kam Hoon v Public Prosecutor**A**

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42-23 OF 2003

AUGUSTINE PAUL J

30 JULY 2003

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Evidence — Refreshing of memory — Document used to refresh memory — Whether cross-examination on portion referred to by witness makes the document evidence against the cross-examiner

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Evidence — Refreshing of memory — Document used to refresh memory — Whether opposing party has right of inspection and cross-examination on document used by witness to refresh his memory

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Evidence — Refreshing of memory — Requirements for — Whether document should be legally admissible before being used to refresh memory — Whether a witness may refresh his memory as of right — Whether leave of court necessary before witness may refer to a document to refresh his memory — Whether evidence of witness may be vitiated where requirements for refreshing memory not met — Evidence Act 1950 s 159

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The accused was convicted in the sessions court of an offence under s 474 of the Penal Code for being in possession of a credit card knowing it to be forged with intent to use it as genuine. He was sentenced to one year and eight months' imprisonment. He appealed to the High Court against conviction and sentence. The record revealed that the prosecution had relied heavily on the evidence of an expert — PW3 — to establish that the credit card was a forged card. Whilst giving evidence in the sessions court, PW3 had referred to his record book but the defence was prevented from viewing the record book. On appeal, the defence submitted that the evidence of PW3 should not be accepted on the basis that he had been allowed to refresh his memory while giving evidence without complying with s 159 of the Evidence Act 1950 ('EA') and that the defence was not allowed to view the document referred to by PW3. The High Court had thus to consider: (a) the circumstances in which a witness may refresh his memory by referring to a document; and (b) the right of the defence to view the document.

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Held, quashing the conviction and sentence against the accused:

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- (1) It is not necessary that a document should be legally admissible before it may be used to refresh memory. A document need not have been admitted in evidence before being used. A witness cannot refresh his memory as of right and must therefore get the leave of court to do so. There must be a need for the witness to refer to a document and it would not be proper to grant leave to refer to such a document simply because a request was made by a party. The facts which entitle a witness to refresh his memory ought to be first elicited from him, that is to say, that he had no

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- A clear independent recollection but wanted to refresh his memory by seeing the writing (see p 694E–G).
- B (2) Where s 159(1) of the EA applies it must then be shown that the writing was made by the witness himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. Where s 159(2) of the EA applies it must be shown that the writing was made in his presence at about the time the incident took place and that he had read that writing at that time and found the contents to be true. It is the responsibility of the prosecution and the court to ensure that the proper document is used to refresh memory (see p 694G–H).
- C (3) Where a document used to refresh the memory of a witness does not comply with the requirements of s 159 of the EA his evidence will be vitiated. If a document is being used to refresh the memory of witness, who recorded it, the fact should be made clear so that the adverse party may exercise the right conferred on him by s 161 of the EA (see p 694I–695A).
- D (4) On the facts, the High Court was unable to say whether the record book used by PW3 to refresh his memory accorded with the requirements of s 159 of the EA. Further there was nothing on record to show that there was a need for PW3 to refresh his memory. It appeared that he referred to the document as of right and the sessions court judge granted him leave to do so automatically without being aware of what was happening and with the prosecution not ensuring that the document referred to by PW3 had satisfied the requirements of the law. Further, the notes of evidence did not also indicate whether it was only a part of the evidence of PW3 that was given after his memory was refreshed. In fact it appeared from notes that PW3 refreshed his memory in respect of the whole of his evidence. The High Court would thus conclude that the whole of PW3's evidence had been vitiated (see p 692F).
- E (5) Section 161 EA entitles the opposing party to a right of inspection and cross-examination on the document used by the witness to refresh his memory. Where the document produces no impression on the memory of the witness the opposite party is not entitled to inspect it. This is simply because the document would not have served its purpose. It is always usual and very reasonable when a witness speaks from memoranda that the counsel should have an opportunity at looking at those memoranda when he is cross-examining the witness. This does not mean that the right cannot be exercised at an earlier point of time. If the right is not exercised then it must be considered as having been waived. That however does not mean that any irregularities in the use of a document to refresh memory under s 159 of the EA are correspondingly waived (see p 696B).
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- (6) Cross-examination on the portion referred to by the witness does not make the document evidence against the cross-examiner. But if there is cross-examination on parts of the document not used by the witness to refresh his memory, the party calling the witness is entitled to require the cross-examiner to make the document evidence (see p 696E). A
- (7) In the instant case, the question of a denial of the right to inspect the document did not arise as no application was made to that effect. However the defence was precluded from cross-examining PW3 on the entries in the book on the ground that the court had given leave to the witness to refer to it. This was clearly irregular. The defence had been denied the opportunity to verify the document used by PW3 to refresh his memory. It was a miscarriage of justice as the defence had been deprived of its statutory right of cross-examination on it. The evidence of PW3 was not admissible with the result that the charge against the accused could not be said to have been proved (see p 696F–G). B
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[Bahasa Malaysia summary]

Tertuduh telah disabitkan di mahkamah sesyen untuk satu kesalahan di bawah s 474 Kanun Keseksaan of the Penal Code kerana memiliki sekeping kad kredit dengan pengetahuan ianya dipalsukan untuk kegunaannya seperti yang asli. Beliau telah dihukum penjara setahun dan lapan bulan. Beliau telah merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Rekod menunjukkan bahawa pihak pendakwa telah bergantung sepenuhnya kepada keterangan seorang pakar — PW3 — untuk membuktikan bahawa kad kredit tersebut merupakan satu kad palsu. Semasa memberikan keterangan di mahkamah sesyen, PW3 telah merujuk kepada buku laporan beliau tetapi pihak pembela telah dihalang daripada melihat buku laporan tersebut. Semasa membuat rayuan, pihak pembela telah berhujah bahawa keterangan PW3 tidak patut diterima atas dasar bahawa beliau telah dibenarkan mengingatkan semula daya ingatan beliau semasa memberikan keterangan tanpa mematuhi s 159 Akta Keterangan 1950 ('AK') dan bahawa pihak pembela tidak dibenarkan melihat dokumen yang dirujuk oleh PW3. Mahkamah Tinggi oleh itu perlu menimbangkan: (a) keadaan-keadaan di mana seorang saksi boleh mengingat semula daya ingatannya dengan merujuk kepada suatu dokumen; dan (b) hak pihak pembela untuk melihat dokumen tersebut. E
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Diputuskan, membatalkan sabitan dan hukuman terhadap tertuduh:

- (1) Ia tidak menjadi keperluan untuk suatu dokumen itu hendaklah diterima secara sah sebelum ia boleh digunakan untuk mengingatkan semula daya ingatan. Suatu dokumen tidak perlu dimasukkan sebagai keterangan sebelum ia digunakan. Seorang saksi tidak boleh mengingatkan semula daya ingatannya secara I

- A** hak dan harus memperoleh kebenaran mahkamah untuk berbuat demikian. Harus ada satu keperluan untuk merujuk kepada suatu dokumen dan ia adalah tidak betul untuk memberikan kebenaran untuk merujuk kepada suatu dokumen itu hanya kerana satu permintaan telah dibuat oleh satu pihak. Fakta-fakta yang
- B** melayakkan seorang saksi itu mengingat semula daya ingatannya patut diperoleh daripada beliau terlebih dahulu, untuk mengatakan, bahawa beliau tiada ingatan jelas tersendiri tetapi ingin mengingat semula daya ingatan beliau dengan melihat cacatan tersebut (lihat ms 694E–G).
- C** (2) Di mana s 159(1) AK terpakai ia harus menunjukkan bahawa cacatan tersebut telah dibuat oleh saksi sendiri pada masa transaksi berkaitan di mana beliau disoal, atau sejeurus selepas itu di mana mahkamah menimbangkan ia adalah mungkin bahawa transaksi pada masa itu masih segar dalam ingatan beliau. Di mana s 159(2) AK terpakai ia harus menunjukkan bahawa cacatan tersebut dibuat dalam kehadiran beliau lebih kurang pada masa kejadian tersebut berlaku dan bahawa beliau telah membaca cacatan tersebut pada masa itu dan mendapati kandungannya adalah benar. Ia adalah tanggungjawab pihak pendakwa dan mahkamah untuk memastikan bahawa dokumen yang betul digunakan untuk mengingat semula daya ingatan (lihat ms 694G–H).
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- E** (3) Di mana suatu dokumen digunakan untuk mengingat semula daya ingatan seorang saksi tidak mematuhi keperluan-keperluan s 159 AK keterangan beliau akan menjadi tidak sah. Jika suatu dokumen digunakan untuk mengingat semula daya ingatan saksi, yang telah merekodkannya, fakta tersebut hendaklah dijelaskan agar pihak penentang boleh menggunakan hak yang diberikan kepadanya oleh s 161 AK (lihat ms 694I–695A).
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- G** (4) Berdasarkan fakta-fakta tersebut, Mahkamah Tinggi tidak dapat mengatakan sama ada buku laporan yang digunakan oleh PW3 untuk mengingat semula daya ingatan beliau memenuhi keperluan-keperluan s 159 AK. Tambahan pula tiada apa-apa atas rekod yang menunjukkan bahawa terdapat keperluan untuk PW3 mengingat semula daya ingatan beliau. Ia kelihatan bahawa beliau telah merujuk kepada dokuemn tersebut menurut haknya dan hakim mahkamah sesyen telah memberikan kebenaran kepada beliau untuk berbuat demikian secara automatik tanpa menyedari apa yang berlaku dan pihak pembela tidak memastikan bahawa dokumen yang dirujuk oleh PW3 telah memenuhi keperluan-keperluan undang-undang. Bahkan, nota-nota keterangan juga tidak menunjukkan sama ada ia hanya sebahagian daripada keterangan PW3 yang telah diberikan selepas ingatan beliau diperingatkan semula. Pada hakikatnya dapat dilihat dari nota-nota bahawa PW3 telah mengingat semula daya ingatan beliau berhubung keseluruhan keterangan beliau. Mahkamah Tinggi oleh itu akan membuat kesimpulan bahawa keseluruhan keterangan PW3 adalah tidak sah (lihat ms 692F).
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- (5) Seksyen 161 AK memberi hak kepada pihak yang menentang satu hak untuk memeriksa dan membuat pemeriksaan balas ke atas dokumen yang digunakan oleh saksi tersebut untuk mengingat semula daya ingatan beliau. Di mana dokumen tersebut tidak menunjukkan ianya perlu untuk memperingat semula ingatan saksi pihak penentang tidak berhak untuk memeriksanya. Ini adalah kerana dokumen tersebut tidak memenuhi tujuannya. Ia adalah suatu yang biasa dan munasabah apabila seorang saksi berbicara berdasarkan memoranda di mana peguam sepatutnya diberi peluang untuk melihat memoranda tersebut semasa beliau memeriksa balas saksi tersebut. Ini tidak bermakna hak tersebut tidak boleh digunakan di peringkat awal. Jika hak tersebut tidak digunakan maka ia harus dianggap telah diketepikan. Ini tidak bermakna bahawa apa-apa luar aturan-luar aturan semasa menggunakan dokumen tersebut untuk mengingat semula daya ingatan di bawah s 159 AK sama sekali diketepikan (lihat ms 696B). A
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- (6) Pemeriksaan balas terhadap bahagian yang dirujuk oleh saksi tersebut tidak menjadikan keterangan dokumentar tersebut menentang terhadap pemeriksa balas itu. Tetapi jika terdapat pemeriksaan balas terhadap bahagian-bahagian dokumen yang tidak digunakan oleh saksi tersebut untuk mengingat semula daya ingatan beliau, pihak yang memanggil saksi tersebut berhak untuk memohon pemeriksa balas tersebut membuat keterangan dokumentar (lihat ms 696E). D
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- (7) Dalam kes semasa, persoalan satu penafian hak untuk memeriksa dokumen tidak timbul kerana tiada permohonan telah dibuat tentangnya. Namun begitu pihak pembela dihalang daripada memeriksa balas PW3 atas cacatan-cacatan dalam buku tersebut atas alasan bahawa mahkamah telah memberikan kebenaran kepada saksi untuk merujuk kepadanya. Ini dengan jelas satu luar aturan. Pihak pembela telah dinafikan peluang untuk menentusahkan dokumen yang digunakan oleh PW3 untuk mengingat semula daya ingatan beliau. Ia adalah suatu yang tidak adil kerana pihak pembela terkilang terhadap hak statutorinya untuk membuat pemeriksaan balas ke atasnya. Keterangan PW3 tidak boleh diterima yang mengakibatkan pertuduhan terhadap terduduk itu tidak boleh dikatakan telah dibuktikan (lihat ms 696F–G).] F
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Notes

For cases on the requirements and documents used to refresh the memory, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2130-2136. H

Cases referred to

Baliram Tikaram v Emperor MR (32) 1945 Nag 1 (refd)
Bolton v Tomlin 5 A & E 836 (refd) I

- A** *Detention of Leonard Teoh Hooi Leong, Re The* [1998] 1 MLJ 757 (refd)
Emperor v Mahadeo Dewoo AIR 1946 Bom 189 (refd)
Empress, The v Jhubboo Mahton 8 Cal 739 (refd)
Gregory v Tavernor (1833) 6 C & P 280 (refd)
Henry v Lee 2 Chitty 124 (refd)
Jewan Lal v Nilmoni AIR 1928 PC 80 (refd)
- B** *Moomin bin Seman v PP* [1993] 3 MLJ 282 (refd)
Nemi Chand v Wallace 10 CWN 107 (refd)
PP v Paneerselvan & Anor [1991] 1 MLJ 106 (refd)
Pannalal Shaw v Nanigopal Biswas AIR (36) 1949 Cal 103 (refd)
Queen, The v TM Appuhamy (1959) 60 NLR 313 (refd)
- C** *R v Duncombe* (1838) 8 C & P 369 (refd)
R v Da Silva [1990] 1 All ER 29 (refd)
Republic of India v GP Rajan AIR 1967 Or 115 (refd)
Sabitri Thakurain v FA Svi AIR 1933 306 (refd)
Senat v Senat (1965) P 172 (refd)
Yuen Chun Yui v PP [1997] 3 SLR 57 (refd)

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Legislation referred to

Evidence Act 1950 ss 159(1), (2), 161
Penal Code s 474

- E** **Appeal from:** Arrest Case No 1-62-141 of 2001 (Sessions Court, Kuala Lumpur)

How Boon Seng (The Chambers of Seng) for the appellant.

Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Augustine Paul J: In this case, the accused was charged in the Sessions Court at Kuala Lumpur for an offence under s 474 of the Penal Code for being in possession of a Visa Credit Card knowing it to be forged with intent to use it as genuine. He claimed trial to the charge. At the conclusion of the trial, he was found guilty and convicted. He was sentenced to imprisonment for a term of one year and eight months. This appeal is by the accused against the conviction and sentence.

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The evidence in the sessions court reveals that PW1 was a cashier attached to the Jaya Jusco at Mid Valley. On 3 November 2001, the accused came to her counter to make payments for purchases made by him through a Visa card (exh PI). As she said:

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Apabila saya terima kad itu daripada tertuduh saya periksa kad itu dan didapati hologram burung itu bila pusing, tidak bergerak dan saya dapati juga label Visa di bawah hologram itu tidak ada angka. Saya swipe untuk dapat pengesahan daripada bank. Bila saya swipe ada approval code.

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She said her examination of the card showed that it was false. She then telephoned the credit card company and her examination was confirmed.

PW1 then reported the matter to her security division. The accused was arrested. The learned deputy public prosecutor ('DPP') conceded that the evidence of PW1 is insufficient on its own to establish that exh P1 is a forged card presumably on the ground that it is a fact that must be established by expert opinion evidence. The prosecution therefore relied on the evidence of PW3, an expert in this field, to establish this element. He gave evidence to show that exh P3 is a forged card. While giving evidence, he had referred to his record book as evidenced by the following entry made by the learned sessions court judge at the end of his examination-in-chief:

Saksi dibenarkan merujuk kepada buku catitannya.

His cross-examination was rather short. It runs as follows:

Selepas dipanggil oleh Sjn Jamari, saya pergi ke IPK. Siasatan dijalankan di IPK. Saya tidak bawa balik kad. Saya buat catatan untuk menolong saya. Saya tidak membawa catatan itu hari ini. Saya ada buat catitan harian mengenai kes ini. Ini adalah buku saya simpan untuk mencatat semua siasatan dijalankan.

P/bela: Sila beritahu Mahkamah apa yang ada dicatit dalam buku catatan itu.

Saksi: Telah membaca catitan itu.

Catitan dalam buku ini adalah catitan saya sendiri. Saya gunakan catitan ini untuk Mahkamah hari ini.

Mahkamah: Soalan-soalan mengenai catitan tidak relevan atas alasan bahawa saksi dibenar merujuk kepada catitannya.

The thrust of the submission of the defence was that the evidence of PW3 should not be accepted as he had been allowed to refresh his memory while giving evidence without complying with s 159 of the Evidence Act 1950 ('s 159') and that the defence was not allowed to view the document referred to by PW3. The learned DPP said that even if the cross-examination of PW3 was found to be defective his examination-in-chief must be accepted. The submission advanced raises two matters for consideration. They are:

- (a) the circumstances in which a witness may refresh his memory by referring to a document; and
- (b) the right of the defence to view the document.

I shall now consider both the issues.

(a) The circumstances in which a witness may refresh his memory by referring to a document

This is governed by s 159 which reads as follows:

- (1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon

- A afterwards that the court considers it likely that the transaction was at that time fresh in his memory.
- (2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.
- B (3) Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of that document:
- Provided the court is satisfied that there is sufficient reason for the non-production of the original.
- C (4) An expert may refresh his memory by reference to professional treatises.

Generally, a witness gives evidence on facts from his recollection. It sometimes happens that he is unable to remember them. He is then allowed to refer to documents containing an account of the facts. This is known as refreshing memory. As ERSR Coomaraswamy says in his book entitled *The Law of Evidence* Vol II Book 2 at p 822:

By 'refreshing memory' is meant that he looks at the document and then gives his evidence. He cannot read the document aloud as his evidence.

- E In order to ensure that the document referred to is reliable, s 159 provides that the writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory or if the writing is made by someone else it must have been read by the witness within the aforesaid time and known by him to be correct. In commenting on the time of preparation of the document, *Sarkar on Evidence* (15th Ed) Vol 2 says at p 2298:

- G It is plain that no precise time limit is possible. The law does not require that the writing must have been made the moment the transaction took place. If it is not possible to make it contemporaneously with the transaction, it must be made so soon afterwards that it may be reasonably inferred that the facts were fresh in the mind. Whether the interval between the two, is such as to justify the presumption that memory became impaired, is a matter depending on the circumstances of each case and the retentive faculty of each witness. The section gives the court a discretion and if it considers it probable that the facts were fresh in the witness's mind when the writing was made, it will decide in favour of the document. In the case of a document written by another, it must be read and its accuracy recognized by the witness within the aforesaid time.
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In dealing with the determination of contemporaneity, Stuart-Smith J said in *R v Da Silva* [1990] 1 All ER 29 at p 32:

- I Counsel for the appellant has drawn our attention to *R v Graham* (1973) Grim LR 628, in which the court said that a judge should hesitate before deciding that a statement made 27 days after the event was contemporane-

ous. But the court was not there saying that a statement made after that length of time could not be contemporaneous. It is a question of fact and degree in each case, and the matter should be investigated to see that the events were fresh in the witness's mind after the lapse of time. Much will depend on the nature of the evidence to be given. Where, for example, a witness purports to give a verbatim account of a conversation, the note will need to have been made much nearer the time than if he merely purports to give the general effect of a conversation.

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The document is not evidence but the recollection is. As Ellenborough LCJ said in *Henry v Lee* 2 Chitty 124:

It is not the memorandum that is the evidence, but the recollection of the witness.

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The words 'any writing' in s 159 is a reference to every kind of writing. As *Sarkar on Evidence* (15th Ed) Vol 2 says at p 2295:

It is immaterial therefore, what the document is, whether, it be a book of account, letter, bill of particulars of articles furnished, including such items as dates, weights, and prices, way-bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness.

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It is therefore not necessary that a document should be legally admissible before it may be used to refresh memory (see *Emperor v Mahadeo Dewoo* AIR 1946 Bom 189; *Bolton v Tomlin* 5 A & E 836). It follows that the document need not have been admitted in evidence before being used (see *Jewan Lal v Nilmoni* AIR 1928 PC 80).

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A witness cannot refresh his memory as of right and must therefore get the leave of Court to do so (see *Public Prosecutor v Paneerselvan & Anor* [1991] 1 MLJ 106; *Re The Detention of Leonard Teoh Hooi Leong* [1998] 1 MLJ 757; *Moomin bin Seman v Public Prosecutor* [1993] 3 MLJ 282). There must be a need for the witness to refer to a document and it would not be proper to grant leave to refer to such a document simply because a request was made by a party (see *Yuen Chun Yui v PP* [1997] 3 SLR 57). The facts which entitle a witness to refresh his memory ought to be first elicited from him, that is to say, that he had no clear independent recollection but wanted to refresh his memory by seeing the writing (see *Sabitri Thakurain v FA Svi* AIR 1933 306). Where s 159(1) applies it must then be shown that the writing was made by the witness himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. Where s 159(2) applies it must be shown that the writing was made in his presence at about the time the incident took place and that he had read that writing at that time and found the contents to be true. It is the responsibility of the prosecution and the court to ensure that the proper document is used to refresh memory.

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Where a document used to refresh the memory of a witness does not comply with the requirements of s 159 his evidence will be vitiated (see *Pannalal Shaw v Nanigopal Biswas* AIR (36) 1949 Cal 103). If a document

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A is being used to refresh the memory of a witness, who recorded it, the fact should be made clear so that the adverse party may exercise the right conferred on him by s 161 of the Evidence Act 1950 ('s 161') (see *The Queen v TM Appuhamy* (1959) 60 NLR 313).

In this case, PW3 referred to his record book while giving evidence. This is a book that he keeps for recording his investigations. PW3 had also, however, made some other entry elsewhere to assist him in the investigation. Quite obviously that is the writing that was prepared contemporaneously by PW3 at the time he conducted the investigation. There is no indication as to when the record book used by PW3 was prepared. He did not bring that entry to Court. Thus, I am unable to say whether the record book used by PW3 to refresh his memory accords with the requirements of s 159. In any event there is nothing on record to show that there was a need for PW3 to refresh his memory. It would appear that he referred to the document as of right and the learned sessions court judge granted leave to do so automatically without being aware of what was happening and with the prosecution not ensuring that the document referred to by PW3 has satisfied the requirements of law. I must add that the notes of evidence do not indicate whether it was only a part of the evidence of PW3 that was given after his memory was refreshed. On the contrary, the note made by the learned sessions court judge at the end of the examination-in-chief may convey the impression that PW3 refreshed his memory in respect of the whole of his evidence. In the circumstances, I am compelled to conclude that the whole of the evidence of PW3 has been vitiated.

(b) The right of the defence to view the document

The matter is further compounded by the refusal of the learned sessions court judge to allow the defence to cross-examine PW3 on the record book he had used to refresh his memory simply because he had been granted leave to do so. This overlooks s 161 which reads as follows:

Any writing referred to under sections 159 or 160 must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

G This section entitles the opposing party to a right of inspection and cross-examination on the document used by the witness to refresh his memory.

The right of inspection

H Where the document produces no impression on the memory of the witness the opposite party is not entitled to inspect it (see *R v Duncombe* (1838) 8 C & P 369; *Nemi Chand v Wallace* IO CWN 107). This is simply because the document would not have served its purpose. Field J said in *The Empress v Jhubboo Mahton* 8 Cal 739 that the grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold:

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- (i) to secure the full benefit of the witness' recollection as to the whole of the facts;

- (ii) to check the use of improper documents; and
- (iii) to compare his oral testimony with his written statement.

His Lordship suggested that the right must be exercised at the time the document is referred to; failing which it is lost. This view, to my mind, is too rigid as the opposing party may be in a better position to appreciate the contents of the document at the end of the examination-in-chief. Thus, I would agree with *Republic of Indra v GP Rajan* AIR 1967 Or 115 where it was held that it is always usual and very reasonable, when a witness speaks from memoranda, that the counsel should have an opportunity of looking at those memoranda when he is cross-examining the witness. This, of course, does not mean that the right cannot be exercised at an earlier point of time. Needless to say, if the right is not exercised then it must be considered as having been waived. That, of course, does not mean that any irregularities in the use of a document to refresh memory under s 159 are correspondingly waived.

The right of cross-examination

Quite clearly, the principal object of this right is to give the opposing party a further opportunity to ensure that the document used to refresh memory is in compliance with the requirements of s 159. Cross-examination on the portion referred to by the witness does not make the document evidence against the cross-examiner (see *Gregory v Tavernor* (1833) 6 C & P 280). But if there is cross-examination on parts of the document not used by the witness to refresh his memory, the party calling the witness is entitled to require the cross-examiner to make the document evidence (see *Senat v Senat* (1965) P 172).

In this case, the question of a denial of the right to inspect the document does not arise as no application was made to that effect. But the defence was precluded from cross-examining PW3 on the entries in the record book on the ground that the court has given leave to the witness to refer to it. This is clearly irregular. The defence has been denied the opportunity to verify the document used by PW3 to refresh his memory. It is a miscarriage of justice as the defence has been deprived of its statutory right. Evidence is not admissible when a party has been deprived of his statutory right of cross-examination on it (see *Baliram Tikaram v Emperor* AIR (32) 1945 Nag 1). The evidence of PW3 is therefore not admissible.

In the final analysis, the evidence of PW3 cannot be taken into consideration with the result that the charge against the accused cannot be said to have been proved. In the circumstances, I allowed the appeal and quashed the conviction and sentence against the accused.

Conviction and sentence against accused quashed.